STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B116©

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GARFIELD M. OLMSTED,

Complainant,

VS.

DEPARTMENT OF REVENUE, INFORMATION TECHNOLOGY DIVISION,

Respondent.

The hearing convened on July 3, 1997, before Robert W. Thompson (Thompson), Administrative Law Judge (ALJ). A three day evidentiary hearing was held before Margot W. Jones, ALJ, concluding on October 28, 1997, with the submission of the parties' closing arguments. Complainant, Garfield M. Olmsted, was present at the hearing and represented by Charles Kaiser and Kent Long, Attorneys at Law. Respondent appeared at hearing through Gary Herbert, Assistant Attorney General.

Complainant testified in his own behalf and called the following employees of the Department of Revenue (Department) to testify at hearing: Margaret Mitchell; Jo Derringer; Mary Height; Ron McNutt; Steve Akers; and Louis Innis.

Respondent called the following employees of the Department to testify at hearing: Amelia Buchanan; Mary Height; Steve Akers; Neil Peters; John Vecchiarelli; and Ron McNutt.

Complainant's exhibits A through FF were admitted into evidence without objection. Respondent's exhibits 1 and 2 were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals Respondent's issuance of performance ratings, the decision to downgrade his position and the decision to transfer him from the Taxation Line of Business to the Transportation Line of Business. Complainant alleges that the decisions made with regard to his position were taken in retaliation for the exercise of his First Amendment right to free

speech and for the disclosure of information in violation of section 24-50.5-103, C.R.S. (1988 Repl. Vol. 10B).

ISSUES

The following issues were raised by the parties:

- 1. whether Complainant was retaliated against for the exercise of his First Amendment right to free speech or for the disclosure of information related to the income tax initiative project;
- 2. whether Complainant was retaliated against for the exercise of his First Amendment right to free speech and for the disclosure of information related to Complainant's report of an allegation of sexual harassment;
- 3. whether the downgrade of Complainant's position, the abolishment of his position, and his transfer to the Transportation Line of Business was a part of a sham reorganization, was a disguised disciplinary action, and therefore was arbitrary, capricious and contrary to rule or law; and
- 4. whether Complainant is entitled to an award of attorney fees and costs under section 25-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

PROCEDURAL HISTORY

1. On February 10, 1997, Complainant filed a motion for extension of time to file a notice of appeal and petition for hearing. The motion for extension of time was docketed as case number 97G062. In the motion Complainant sought an order granting an extension of time to file an appeal of an interim and final PACE evaluations. Complainant alleged in the motion that the interim and final PACE evaluations contained overall ratings of "Good". Complainant further alleged that the PACE ratings were retaliatory and violated Complainant's First Amendment right to free speech. The motion further alleged that Complainant would receive a notice of downgrade and transfer and would file a notice of appeal of this action.

The February 10, 1997, motion for extension of time was docketed as case 97G062. The case was assigned to Thompson, ALJ. Thompson granted the motion for extension of time to February 28, 1997. On February 26, 1997, Complainant filed a notice of appeal and petition for hearing. The petition for hearing contained a whistle blower complaint. Complainant's February 26, 1997, notice

of appeal and petition for hearing were assigned case number 97B116. Case numbered 97G062 was consolidated with case number 97B116. The consolidated cases were numbered 97B116(c).

On April 9, 1997, Complainant requested that his claims brought under the State Employee Protection Act be set for hearing, thus waiving Complainant's right to an investigation by the State Personnel Director. On April 25, 1997, Thompson granted Complainant's request to have the appeals set for hearing. In the April 25, 1997, order Thompson clarified the issues to be considered at hearing to include those issues raised by Complainant which result from issuance of the PACE ratings, the downgrade of Complainant's position, and Complainant's transfer.

2. On June 11, 1997, Kent Long entered his appearance as attorney of record with co-counsel, Charles Kaiser. During Thompson's tenure with the State Personnel Board as a part time ALJ he was known to be actively engaged in the practice of law with Kent Long.

Thompson became ill during the summer of 1997 and was absent from work due to illness. The Board's Director had limited information about the prognosis for Thompson's recovery from the illness. This fact, combined with the Thompson's prior association with Complainant's attorney, resulted in the Director's assignment of the case to the undersigned.

3. The State Employee Protection Act was amended in June 1997. The appeal in this matter was filed in February 1997. Therefore, the provisions of the statute as it appears in the 1988 Replacement Volume 10B are applied in this case.

FINDINGS OF FACT

- 1. Complainant, Garfield Olmsted (Olmsted), has been employed by the Department for approximately 11 years. At the time relevant to this appeal, from 1995 through Olmsted's appeals filed in 1997, he worked under the supervision of Ron McNutt (McNutt).
- 2. McNutt began his employment with the Department in October, 1995. He is the Director of the Department's Information Technology Division (IT) and the Department's Chief Information Officer. He is the appointing authority for Olmsted's position.
- 3. McNutt reported to Amelia Buchanan, Deputy Director of the Department. Renny Fagan is the Executive Director of the Department.

- 4. Amelia Buchanan (Buchanan) was Deputy Director of the Department for 9 years. She was employed by the Department for a total of eleven years. She left the Department in 1997 to pursue her education.
- 5. Buchanan viewed Olmsted as a troublemaker. She held this belief before October, 1995 when McNutt was appointed to his position. Buchanan viewed Olmsted as a manager who was unwilling to change. Buchanan had no problem with Olmsted's technical skills, but thought he lacked managerial skills. From 1995 to 1997, when Buchanan left the Department, she advised and gave counsel to McNutt with regard to his decisions about Olmsted's position.
- 6. Olmsted was classified as a Programmer/Systems Analyst Manager, Grade 111, Step 7, until March 4, 1997, when his position was downgraded to Programmer/Analyst IV, Grade 104, Step 8. Olmsted was certified in the position as a Programmer/Systems Analyst Manager in January, 1993. During the relevant period, Olmsted was the Manager of IT's Taxation Line of Business.
- 7. In 1995, the Department was organized on a centralized model. Division heads gathered periodically in order to prioritize the top projects of the Department. The prioritization tended to focus only on the larger IT projects. The centralized model was considered unresponsive to the business units served by IT.
- 8. As a consequent of the concern that the centralized model did not serve the business units, a decentralized model for use of IT services was constructed effective July 1, 1995. McNutt was appointed Division Director effective October, 1995. He was also appointed Chief Information Officer to set strategic direction and integrate the Department's IT activities. IT was organized according to the Department's "lines of business" (LOB).
- 9. A LOB consists of divisions with similar functions. The Department has four LOBs. The Administrative LOB includes the Office of the Executive Director and IT divisions. The transportation LOB includes the Motor Vehicle and Motor Carrier Services divisions. The Tax LOB includes Tax and Audit Compliance, Taxpayer Services, and Cash and Document Processing divisions. The Enforcement LOB includes the Gaming, Liquor, and Racing divisions.
- 10. Under the decentralized plan, each LOB was allocated IT resources to focus on its special priorities. Each LOB was expected to allocate a percentage of IT resources for Departmental

initiatives.

- 11. The decentralized plan was implemented by McNutt with a minimum of change in the Department's management structure.
- 12. Olmsted received yearly job performance evaluations during the years 1990 through July, 1995. Each year Olmsted received an overall job performance evaluation of "Outstanding".
- 13. In July, 1995, Margaret Mitchell (Mitchell) was the Manager of the Applications/Development section. Olmsted was a Programmer/Analyst Manager in charge of 24 staff members in the Taxation LOB. Olmsted worked under Mitchell's supervision.
- 14. In July, 1995, Mitchell rated Olmsted's job performance for the period July, 1994 to June, 1995 as "Outstanding". In mid year evaluations of Olmsted's job performance by Mitchell in January and May, 1995, Mitchell made the following comments about Olmsted's performance:

Management

Gar has done a great job working with various user groups to develop lines of communication and rapport. Not only do the user groups now feel they have our support, but also Gar and his staff understand better their specific needs and problems.

Gar also provides methods and procedures for his employees to complete work. For example, he has trained his staff in the use process modeling, which they have used to great advantage.

Occupational/Professional Competence

Gar finds and utilizes training opportunities, and applies new skills to his job. His professional/technical skills are strong.

<u>Supervision/Human Resources Management</u>

Gar provides a great deal of training, feedback, and encouragement to his employees. His staff have demonstrated productivity, competence and morale.

Problem Analysis and Decision Making

Gar is good at problem solving. He often make suggestions in the Team Leader, Problem Change, and Technical Steering meetings.

Many times he has anticipated potential problems and in so doing **b** helped the agency avoid major difficulties.

Planning, Organizing and Coordinating

In the time of scarce resources and numerous project demands, Gar has been able to utilize staff from various teams to maximize the amount of work accomplished. Concern that projects (Position Cost) have run longer than planned - problem w/ control of user

needs/changes.

Organizational Commitment and Adaptability

Gar conveys a positive image of the DOR [Department of Revenue] and of state employees in general. He always puts forth extra effort when needed.

Communications

His written documents are complete, clear and understandable. He exchanges information willingly, and keeps me informed of issues and project status. He participates in staff meetings. I can always tell that information has been communicated by him to his staff because of their response to me.

Interpersonal Relations

Gar has maintained smooth working relations, and has earned the support and respect of others. He gains cooperation from the staff, and is both accessible and responsive.

Quality Management

Gar is concerned about the quality and level of service provided by his staff, and is looking for ways to improve the service given. He continually works with his users to understand their needs and is able to anticipate some needs before they ask and to respond quickly to any request.

- 15. Following McNutt's appointment as Division Director, Mitchell was assigned to take charge of the Centralized Functions of the IT organization. After Mitchell's reassignment, Olmsted as IT's Manager of the Taxation LOB reported directly to McNutt.
- 16. Olmsted was also assigned to manage the Income Tax Initiative project (ITI project). The ITI project was the number one project undertaken by the Department. The project began in 1994. It is a project intended to change and redesign the Department's computer system. The project is rewriting and redesigning the way taxes are collected. Successful completion of this project is required in order to process income tax returns in the year 2000.
- 17. In February and March, 1996, Olmsted began expressing concern to McNutt about the project. Olmsted advised McNutt that he had concerns about the way the project was managed and about the technologies that were to be used. Olmsted maintained that the project design was too risky and the project's costs were underestimated.
- 18. In March, 1996, McNutt gave Olmsted an interim job performance rating of "Commendable". This rating covered the period from October, 1995, to January, 1996.

- 19. During April through June, 1996, Olmsted raised his concerns about the ITI project with the Stakeholders Committee. The Stakeholders Committee was a group that determined the direction of the ITI project. Olmsted and McNutt were members of the Committee. The Stakeholders Committee also consisted of three division directors, a representative of the Department's Executive Director, and the Income Tax Project Director.
- 20. McNutt was extremely frustrated and irritated with Olmsted's expressions of his concern about the ITI project. McNutt viewed Olmsted as being unable to adapt to new points of view. McNutt believed that Olmsted was not a team player and that he should embrace the decisions made by the Stakeholders Committee. McNutt believed that Olmsted's actions repeatedly raising his concerns about the ITI project impeded progress on the project.
- 21. In July, 1996, Olmsted received a performance rating for the period from July, 1995 through June, 1996. Olmsted received an overall rating of "Good". Attached to the rating was a 13 page narrative detailing the areas in which Olmsted needed to improve his job performance. McNutt's opinion of Olmsted's job performance was radically different from Mitchell's one year earlier.
- 22. From July to December, 1996, Olmsted continued to raise his concerns about the ITI project. Olmsted raised these concerns with McNutt and the Stakeholders Committee on a routine basis. Olmsted raised concerns that the project could not be completed on time. Olmsted also expressed concern that the projected cost were misrepresented to the state legislature's Joint Budget Committee and other governmental oversight authorities.
- 23. In November, 1996, McNutt gave Olmsted another interim job performance rating. Again, McNutt rated Olmsted's performance as "Good". This rating covered the period July, 1996 through October, 1996. This performance rating attached an 18 page narrative instructing Olmsted on how to improve his job performance. In four of the ten individual performance objectives, McNutt rated Olmsted as "needs improvement" or "unacceptable". Olmsted received an overall point rating of 265 points. The "Good" range point score was from 251 points to 350 points.
- 24. McNutt's irritation with Olmsted's expressions of opposition to the way the ITI project was implemented increased significantly by December, 1996. Colleagues who met with McNutt after his meetings with Olmsted observed that McNutt was visibly shaken and

angered by his encounters with Olmsted.

- 25. McNutt decided to remove Olmsted from his position in the Taxation LOB and over the ITI project in order to silence his opposition to the decisions made with regard to the ITI project.
- 26. In a January 9, 1997, e-mail message, McNutt advised the staff of the IT Division and other Department managers that he was reorganizing the IT Division. The e-mail states:

In an attempt to further support our current Line of Business structure and to facilitate a flatter management hierarchy within IT, I am announcing some changes for IT effective immediately:

- 1. Margie Mitchell will be the LOB manager for Taxation.
- 2. Reva Nayar and Larry Bauer will report directly to me.
- 3. Gar Olmsted will move to Transportation and report directly to Mary Hight.
- 4. Pat Chase will take over the Project Manager position Wheels/CVISN and will report directly to Mary Hight.
- 5. We will start a search immediately for a new Project Manager for Income Tax (potentially internally and externally)
- 6. The Income Tax Project Manager (and the project itself) will report up through Margie Mitchell in Taxation rather than directly to me.

In addition to the above, it will be my objective to further decentralize some more of the DBAs. This will be done over the course of the next six months. Specifically, who will go where will be determined at a later date. It is my intention to meet separately with Central, Taxation, and Income Tax project over the next week or so in order to answer questions.

- 27. On January 6, 1997, Olmsted received another interim performance rating. The interim rating was finalized on January 30, 1997. McNutt again rated Olmsted's job performance. This rating was described as the final job performance rating before Olmsted's transfer to the Transportation LOB. The rating covered the period from July, 1996 to January 9, 1997. Again, Olmsted received an overall rating of "Good". This rating was virtually a copy of the rating in November, 1996, except that it did not include the lengthy narrative. Olmsted was rated "Need Improvement" and "Unacceptable" in many of the rating subcategories.
- 28. By giving Olmsted "Good" job performance ratings with the

- lengthy negative narratives, McNutt communicated his displeasure with Olmsted's expressions of concern over the ITI project, yet prevented him from seeking review of the ratings. McNutt was aware that Olmsted could not seek review outside the Department of job performance ratings with overall ratings of "Good" or better.
- 29. On January 16, 1997, Olmsted filed a grievance with McNutt pertaining to the interim job performance rating and raising allegations of harassment and retaliation. McNutt and Olmsted were unsuccessful in resolving the grievance.
- 30. Olmsted proceeded to the next steps of the grievance process. He presented the grievance to Amelia Buchanan, Department Deputy Director, on January 21, 1997. He presented the grievance to Renny Fagan, Department Executive Director, on January 27, 1997. Buchanan and Fagan did not respond to the grievance. The Human Resources Director, Neil Peters, advised Olmsted that Fagan and Buchanan had no obligation to respond to the grievance. Peters encouraged Olmsted to seek review of the grievance by the State Personnel Board, but cautioned him that the Board rarely grants a hearing for review of performance evaluations.
- 31. On February 4, 1997, Olmsted wrote to Fagan, Buchanan, McNutt and Neil Peters. He recited the efforts he made to present his grievance and seek resolution of the issues raised in the grievance at the lowest level possible. He urged them that in light of the allegations of harassment and retaliation to reconsider the decision not to discuss the grievance.
- 32. In February, 1997, Olmsted was still in his position in the Taxation LOB as a Programmer/Systems Analyst Manager Grade 111, Step 7. Margaret Mitchell was directed by McNutt to prepare a position description questionnaire (PDQ) for Olmsted's position, position number 1590. McNutt directed Mitchell to prepare the PDQ reflecting duties of a Programmer/Analyst IV, ITI Project Manager.
- 33. In February, 1997, Olmsted was not Manager of the ITI. McNutt advised Mitchell that he wanted Olmsted's PDQ prepared at the Programmer/Analyst IV level so that Olmsted could be transferred to the Transportation LOB at the Programmer/Analyst IV level.
- 34. Mitchell prepared the PDQ and signed the document as the supervisor of the position on February 3, 1997. Mitchell was concerned that the document required the signature of the incumbent of the position assigned the duties described in the document.

Realizing that Olmsted did not perform the duties described in the PDQ and that he did not participate in the preparation of the PDQ, she questioned McNutt and Department human resource managers about how to proceed. She was directed to write in the place where Olmsted's signature should have been, "Employee refuses to sign".

- 35. Olmsted did not refuse to sign the PDQ, therefore, Mitchell was not comfortable with inserting this statement in the signature block where Olmsted's signature should have been. Instead, Mitchell wrote "These are not Gar's statements so he declined to sign. M. Mitchell" This statement was also untrue, since Olmsted did not decline to sign.
- 36. The PDQ was submitted to the Department's Human Resources Office. Attached to the PDQ was a form entitled a "Request for Personnel Action". The form requested that Olmsted's position be audited. The form was signed by McNutt and Mitchell. It reflected that Olmsted was voluntarily requesting to demote from a Programmer/Systems Analyst Manager to Programmer/Analyst IV. Olmsted did not volunteer to demote to a lower position.
- 37. McNutt elected to cast the position audit request as a voluntary demotion in order to defeat Olmsted's right to appeal a disciplinary demotion.
- 38. Steve Akers, a Department Personnel Analyst, reviewed the PDQ. It was Akers' practice to take an average of 30 days to complete a position audit. In 24 hours, Akers responded to the request for a position audit and he downgraded Olmsted's position from a Programmer/Analyst Manager, Grade 111, to a Programmer/Analyst IV, Grade 104. By Notice dated February 18, 1997, Olmsted was advised that his position was downgraded. He was advised that the decision would become final agency action on March 4, 1997.
- 1997, a position was created 39. On March 5, Programmer/Analyst IV level in the Transportation LOB and Olmsted was transferred to the position. Olmsted was assigned to work under the supervision of Mary Hight, Manager of the Transportation Originally, the position to which Olmsted was to be transferred in the Transportation LOB was a Programmer Analyst III However, had Olmsted been transferred to Programmer/Analyst III position, he would have had retention rights to the Programmer/Analyst IV position in the Taxation LOB. McNutt did not want Olmsted to have rights to any position in the Taxation LOB. Consequently, Mary Hight was advised by McNutt that the new position in her LOB would be created at the higher level.

- 40. McNutt had the approval and support of Amelia Buchanan in the decisions made with regard to Olmsted's position. Buchanan joined McNutt in the desire to silence Olmsted's opinions about the ITI project by removing him from his position in the Taxation LOB. Buchanan also joined McNutt in his desire to adversely effect Olmsted's employment in retaliation for the expression of his opinions about the ITI project.
- 41. Beginning February 18, 1997 and continuing, Olmsted voiced his concerns about the ITI project in writing. He reiterated the concerns he had previously registered verbally about risks, costs, and technologies in written documents.
- 42. Many of the concerns expressed by Olmsted in early 1996 and thereafter about the ITI project proved to be correct.

DISCUSSION

Complainant contends that he sustained his burden of proof to establish that he is entitled to the protection of the State Employee Protection Act, section 24-50.5-101, et. seq., C.R.S. (1988 Repl. Vol. 10B). Complainant argues that he voiced concerns about the ITI project, and as a result, he was retaliated against. Complainant argues that his evidence shows that he was subjected to a unsatisfactory job performance ratings, a sham reorganization which included a position audit, downgrade and transfer.

Complainant also argues that he is entitled to the protection of the Act because he voiced concern about the Department's decision to continue the employ of a manager accused of sexual harassment and then he was retaliated against. Complainant maintains that after raising the issue of the manager's behavior he was subjected to unsatisfactory job performance ratings, a sham reorganization, position audit, downgrade and job transfer to the section where the accused harasser was employed.

Complainant seeks relief under the Act as provided by section 24-50.5-104, 106 and 107.

Complainant argues that he is also entitled to the protection of the First Amendment of the United States Constitution. Complainant maintains that he was punished for the expression of his opinion.

Finally, Complainant asserts that Respondent should be found

to have acted arbitrarily, capricious, and contrary to rule and law in implementing the reorganization and in auditing and downgrading his position. Complainant maintains that the reorganization failed to comply with State Personnel Board rule 9. Complainant contends that Respondent failed to post the plan of reorganization and the reorganization was a sham because the changes did not change the fundamental structure, positions or functions accountable to the appointing authority as required by rule, R9-3-1. Complainant further contends that Respondent's action auditing and downgrading his position should be found to be a disguised disciplinary action and should not be permitted to stand under Renteria v. State Department of Personnel, 811 P.2d 797 (Colo. 1991).

Respondent contends that Complainant is a complainer. Simply put, it is Respondent's contention that Complainant was permitted to complain to McNutt, the Stakeholders Committee and to others. Respondent maintains that a some point Complainant's complaints became counterproductive and McNutt needed to take some action to bring the complaining to a close. Respondent contends that Complainant's concerns were considered by the Stakeholders Committee and were overruled. Respondent argues that at some point, as a manager, Complainant was expected to support the ITI project and cease his complaints about the direction the project took.

Respondent maintains that Complainant received a corrective action in 1988 for the same conduct from another appointing authority when he failed to support the Department's objectives. Respondent contends that this is evidence that Complainant had a history in the Department of engaging in this type of counterproductive behavior.

Respondent asserts that Complainant's communications to McNutt about the allegation of sexual harassment had nothing to do with the decisions made with regard to Complainant's position. Respondent argues that it should be found that the allegations were raised by the victim of the harassment, an investigation into the allegations was conducted, and that as a result of the information gathered during the investigation action was taken by Department managers against the accused harasser. Respondent contends that all this occurred prior to McNutt's employment by the Department in October, 1995. Respondent asserts that Complainant brought information to McNutt about the allegations of sexual harassment, McNutt made further inquiry about the allegations and took no further action, concluding that the allegations of harassment had been fully dealt with by the Department. Respondent contends that

the evidence fails to show a causal connection between Complainant's reports and any adverse action taken against him.

Respondent further argues that a reorganization of the Department was undertaken by Renny Fagan prior to October, 1995. Respondent argues that experts were brought into the Department to advise it on the best approach to fulfilling the Department's mission. Respondent maintains that the evidence shows that McNutt was hired in October, 1995 as a part of reorganization process and that he was charge with the duty to reorganize IT. Respondent contends that the reorganization of IT was an ongoing process.

Respondent asserts that it was not subject to rule 9 because the reorganization did not include lay offs. Specifically, Respondent contends that it was under no obligation to post a plan of reorganization.

Respondent also makes the alternative argument that the January 9, 1997, e-mail message concerning the positions that would be affected as of that date by organizational changes was sufficient notice of the reorganization plan to satisfy the requirements of rule 9. Respondent further argues that it had been undertaking fundamental organizational changes since at least October, 1995 and that changes continued to be made in the organizational structure of IT after the January 9, 1997, e-mail message.

Finally, Respondent contends that it's actions in downgrading Complainant's position and transferring him to the Transportation LOB were not a disguised disciplinary action. Respondent contends that this action was a reasonable application of the rules in order to implement the reorganization. Respondent maintains that it is within the discretion of the appointing authority to assign duties and positions. Respondent contends that there was no abuse of discretion in the action taken with regard to Complainant's position.

Under the State Employee Protection Act, Complainant had the burden of proof to establish that the disclosures of information fall within the protection of the statute and that they were a substantial or motivating factor in Respondent's actions adversely affecting his employment. If Complainant makes this initial showing, then Respondent must establish by a preponderance of the evidence that it would have reached the same decisions with regard to Complainant's position even in the absence of the protected conduct. Ward v. Industrial Commission, 699 P.2d 960 (Colo. 1985).

Under the Act, it is prohibited to subject an employee to disciplinary action on account of the employee's disclosure of information. Section 24-50.5-102(1), of the Act, defines "Disciplinary action" as,

[A]ny direct or in direct form of discipline or penalty including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.

Section 24-50.5-102(2), defines "disclosure of information" to mean,

[T]he written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including but not limited to the waste of public funds, abuse of authority, or mismanagement of any state agency.

In this case, the evidence established that Complainant disclosed information about the ITI project to McNutt and the Stakeholders Committee concerning the waste of public funds and mismanagement of the Department. The evidence further establishes that Complainant's disclosures were a motivating factor in the unsatisfactory job performance ratings, demotion and transfer.

The ALJ found the testimony of Complainant, Mary Hight and Mitchell to be persuasive in finding that McNutt was seriously disturbed and annoyed by Complainant's communications about the ITI project and that he took the adverse employment action against Complainant in retaliation for this communication.

McNutt, Neil Peters and Buchanan's testimony was found to lack credibility. However, even their testimony contributed to the finding that the ITI project was extremely important to the State and to the Department, that Complainant had been identified as a troublemaker prior to October, 1995, and thereafter, and that McNutt embarked on a highly irregular personnel process when he had Complainant's position audited and downgraded and transferred Complainant to another position these witnesses were credible. Neil Peters testified that he had been a human resources managers for 26 years. He testified that while he was aware of reorganizations, positions audits, downgrades and transfers occur as they did in this case thousands of times, no specific instance could he recall where a similar procedure was followed.

Since Complainant sustained the initial burden of proof, Respondent was required to establish by a preponderance of the evidence that it would have taken the same action against Complainant even in the absence of the protected conduct. The standard of proof here, "by a preponderance" has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and the administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. 1 at 491 (1985).

Respondent's proffered explanation for its actions with regard to Complainant's position are not believable. The actions taken by McNutt, with Buchanan's approval and Peters' counsel, evidence animosity and hostility toward Complainant. The actions in the reorganizing, auditing, downgrading and transferring Complainant were deceitful and rely on an intentional misinterpretation of the rules and deception so that it cannot be concluded that these actions are the simple product of an appointing authority who wanted to restructure his division.

Respondent points to a 1988 corrective action as evidence that Complainant was previously warned about his counterproductive conduct not supporting Departmental objectives. The previously imposed corrective action is so remote in time as to have no relevancy in this proceeding. However, Respondent's reliance on it serves as evidence that Respondent was on notice that the means of addressing an employee's unacceptable behavior was through the progressive disciplinary process. The means of addressing this conduct was not through the circuitous route taken by Respondent in this case of a sham reorganization and discipline disguised as a position audit and "voluntary" downgrade.

Respondent contends that this was not a sham reorganization, but was the product of many months of thoughtful planning. However, the evidence suggests otherwise. There may have been early discussions of reorganizing the Department. But, when McNutt announced the Complainant's transfer January 9, 1997, e-mail, notice consistent with Rule, R9-3-1 was not provided. This rule

provides,

<u>Reasons</u>. The only reasons for layoff are lack of funds, lack of work, or reorganization.

A reorganization, when not cause by either lack of work or lack of funds, must require changes to the fundamental structure, positions, and/or functions accountable to one or more appointing authority.

In the case of a reorganization when not caused by either lack of funds or lack of work, a written plan of reorganization shall be developed. The plan shall include a chart of the organization, the reasons for the changes, the anticipated benefits and results, and, at least in general terms, the expected changes and their effects on employees. the written plan shall be posted in a conspicuous and accessible place at the work site for a period of at least 45 days beginning with the first notice of lay off pursuant to the plan.

Respondent maintains that it had no obligation to comply with Rule 9 because no one was laid off. Respondent's right. It had no obligation to comply with Rule 9 because there was no reorganization. It was a sham. There was no fundamental restructuring of an organization in this case. The actions taken by McNutt were only intended to adversely affect Complainant as retaliation for his disclosure of information.

McNutt took the actions here to punish Complainant for the disclosure of information and to circumvent Complainant's appeal and retention rights to prevent him from having employment in the Taxation LOB where he had the most experience and where he could have the greatest impact in raising concern about the ITI project. These actions were further intended to warn Complainant that McNutt had control over and animosity toward Complainant which was surprising in its brazen disregard for his rights.

Respondent's proffered explanation for the adverse actions taken against Complainant are not credible and fail to sustain Respondent's burden to establish that it would have taken the same action against Complainant even in the absence of his disclosures. The explanations offered by Respondent were established to be pretextual. The lack of credible evidence about the reason for the adverse actions, coupled with the evidence of deceit and a departure from normal practices in imposing the adverse action, provides a basis for inferring an unlawful motive. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

It is the conclusion of the undersigned that Respondent

violated the provisions of the State Employee Protection Act. However, Complainant also raised claims based on the following: the First Amendment; the theory that the reorganization was a sham and violated Rule 9; and the theory that the demotion and transfer was a guise for discipline. These claims are also sustainable based on the evidence presented here.

There is inadequate evidence from which to conclude that Complainant's reports with regard to the sexual harassment of a female employee had any bearing on the actions taken here.

The relief provided under the Act for the injury suffered by Complainant is very broad. Section 24-50.5-104(2), provides, as follows:

If the State Personnel Board after hearing determines that a violation of section 24-50.5.-103 [prohibiting retaliation against state employees for the disclosure of information] has occurred, or if the investigation establishes a reasonable basis for the charges and no hearing is requested, the board shall order the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credits and expungement of the records of the employee who disclosed the information, and, in addition, the State Personnel Board shall order that the employee filing the complaint be reimbursed for any cost incurred in the proceeding. . .

Under this provision, Complainant is entitled to have the January, 1997, performance ratings expunged from his file. Complainant is also entitled to reinstatement to his position in the Taxation LOB as a Programmer/Systems Analyst Manager with full back pay and benefits.

Under section 24-50-125.5, Complainant is entitled to an award of attorney fees and costs. The actions from which this appeal arose were taken in bad faith, was malicious and was done as a means of harassment. The actions taken by Respondent's appointing authority, McNutt, with the knowledge and approval of former Deputy Director Buchanan, were done to retaliate against Complainant for the disclosure of information.

CONCLUSIONS OF LAW

1. The evidence presented at hearing established that Complainant was retaliated against for the disclosure of information in violation of the State Employee Protection Act, section 24-50.5-101

et. seq., C.R.S. (1988 Repl. Vol. 10B).

- 2. There was no evidence presented at hearing that Complainant was retaliated against for information he provided the appointing authority concerning sexual harassment.
- 3. Complainant was the victim of a sham reorganization. The position audit and downgrade were a guise for a disciplinary action taken in retaliation for Complainant's disclosure of information.
- 4. Complainant is entitled to an award of attorney fees and cost.

ORDER

- 1. Respondent is directed to reinstate Complainant to his position in the Taxation LOB as a Programmer/Systems Analyst Manager with full back pay and benefits from the date of his downgrade to the date of his reinstatement to his former position.
- 2. Respondent is directed to expungement Complainant's employment records of reference to the January 1997 interim and final performance ratings and the voluntary demotion.
- 3. Respondent is directed to comply with the provisions of section 24-50.5-104(4), which requires that when an appointing authority or supervisor is found to have retaliated against an employee for the disclosure of information in violation of the provisions of the State Employees Protection Act, an entry be placed in the supervisors' personnel records concerning these findings. Ron McNutt and Amelia Buchanan are the appointing authority and supervisor found to be responsible for the retaliatory action in this case.

Dated this ____ day of January, 1998, at Denver, Colorado.

MARGOT W. JONES
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the

parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on $8 \, \frac{1}{2}$ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of January, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Charles Kaiser Kent Long Attorneys at Law 1801 Broadway, Suite 1100 Denver, CO 80202

and in inter agency mail addressed as follows:

Gary N. Herbert Assistant Attorney General 1525 Sherman St., 5th Floor Denver, CO 80203